Nos. 01-20-00004-CR and 01-20-00005-CR

In the Court of Appeals
For the First District of Texas
At Houston

———♦———

Nos. 1657519 and 1657521
In the 338th District Court
Of Harris County, Texas

———♦———

***Ex parte* Joseph Eric Gomez**
Appellant

———♦———

State's Response in Opposition to Appellant's Motion to Designate Opinion for Publication

———♦———

Clint Morgan
Assistant District Attorney
Harris County, Texas
State Bar No. 24071454
morgan_clinton@dao.hctx.net

500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826

Kim Ogg
District Attorney
Harris County, Texas

Crystal Okorafor
Assistant District Attorney
Harris County, Texas

This Court should not publish an opinion where it 1) decided the case on an argument not presented to the trial court or raised in a brief, 2) handled the case in a manner that prevented the appellee from responding to this argument in this Court, and 3) reached a result that is counter to a statutory definition and a recent decision by the Court of Criminal Appeals.

The State asks this Court to deny the appellant's motion to publish. Based on the manner this Court handled this case, and the merits of the decision this Court reached, this opinion should not be turned into binding precedent.

I. It is in the State's short-term interests for this Court to publish. The State nonetheless opposes publication.

The State has already petitioned for discretionary review in this case. If the State's only interest here was to win, it would encourage this Court to grant the appellant's motion. The Court of Criminal Appeals is much more likely to grant review of a published opinion than an unpublished one.

But unlike criminal defendants and most civil litigants, the State—just like this Court—is a constitutional officer of the judicial branch and has interests that extend beyond the result of any particular case. *See generally* TEX. CODE CRIM. PROC. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys … not to convict, but to see that justice

is done."). One of these interests is ensuring that the Texas case law accurately states the law and is conducive to achieving a just—*i.e.*, lawful—result in future cases.

Even though it would aid the State in the short term to publish this opinion, the State opposes the motion to publish because it believes this Court's opinion is an incorrect result reached in an irregular manner and should not be made binding on future cases.

II. This Court's opinion is based on a novel argument the appellant never raised. Neither the habeas court nor the State had a chance to respond to it.

By its plain terms, Code of Criminal Procedure Article 17.09 allows a trial court to revoke a bailed defendant's bond and require him to obtain a new bond if the court believes the bond is "insufficient in amount." The appellant's argument to the habeas court was that to revoke a defendant's bond for this this reason, the record must show, and the trial court must find, a "good and sufficient cause." That was the argument presented on appeal, and that was the argument the State responded to.

Rather than decide the case on that argument, this Court reversed the trial court on a novel argument it came up with on its own. Whereas the habeas court and the State—and, before the opinion, the appellant—

believed the reference to the "amount" of the bond in Article 17.09 referred to the amount the trial court required a defendant to pay for release, this Court's opinion interpreted the "amount" of a bond to refer to the amount the defendant had paid. Thus this Court's holding was that any time a defendant bails out of jail a trial court abuses its discretion in using the Article 17.09 procedure finding the bond "insufficient in amount."

This Court made this novel, unargued holding in two cite-free paragraphs. *Ex parte Gomez*, 01-20-00004-CR, 2020 WL 4577148, at *6 (Tex. App.—Houston [1st Dist.] Aug. 7, 2020, pet. filed)(mem. op. not designated for publication). This Court then spent a long part of its opinion pointing out that there was no other "good and sufficient cause" in the record—but neither the habeas court nor the State had made that argument. This Court spent far longer arguing against this point than it did addressing the habeas court's and State's actual argument.

Ordinarily, if a party loses on an argument that had never been raised and which it believed was incorrect, the party could be expected to move for rehearing. But this Court issued its mandates contemporaneous with its opinion. That led to this Court releasing from jail a person the State and the habeas court believed was a danger to the complainant.

The only way the State could get those mandates withdrawn was to skip the rehearing stage and petition for discretionary review. *See* TEX. R. APP. P. 31.4. The State did so on the very next business day.

The argument this Court used to reverse the trial court has not been tested by the adversarial process: It was neither proposed nor opposed by a party. Such a holding should not be made binding precedent.

III. This Court's holding is wrong.

The State is litigating this matter in the Court of Criminal Appeals so it won't belabor the point here. But one reason this Court's opinion should not be published is that its holding is wrong.

A "bail bond" can be posted in two ways. First, the defendant can obtain sureties to vouch for his court appearance and the amount of bail. TEX. CODE CRIM. PROC. art. 17.02. Second, the defendant "may deposit with the custodian of funds of the court … current money of the United States *in the amount of the bond* in lieu of having sureties signing the same." *Ibid.* (emphasis added).

This Court's interpretation of Article 17.09 is that the "amount" of a bond is the amount the defendant has actually posted—thus its conclusion it was "undisputed" the bonds were sufficient because they matched the amount of bail. But if that were true, then any sum of

money deposited with the court would be a bond, regardless of what a magistrate set bail at.

The procedure for cash bonds in Article 17.02 shows that the "amount" of a bond refers to what the magistrate has set the bail at. This Court was wrong to believe the "amount" of the bond was what the defendant had paid.

What's more, this Court's interpretation leaves part of Article 17.09 without practical application. Article 17.09 Section 3 applies *exclusively* to defendants who have already bailed out of jail. This Court's holding is that anytime a defendant makes bail, his bond is necessarily sufficient. Under that holding, there are no circumstances where a trial court could find a defendant's bond "insufficient in amount" under Article 17.09. *See Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015) (courts should interpret statutes so that every word and clause has meaning).

IV. This Court's opinion conflicts with a recent decision by the Court of Criminal Appeals.

It is ironic that the appellant spends much of his motion complaining that the habeas court has not treated this Court's unpublished

opinion as binding precedent.[1] That is because this Court's holding conflicts with an unpublished decision of the Court of Criminal Appeals—where the appellant's counsel represented the losing defendant.

Article 17.09 is not the only statute that allows a court to revoke a bailed defendant's bond if it believes the bond is "insufficient in amount." Two statutes allow judges of intermediate appellate courts, the Court of Criminal Appeals, district courts, and county courts to require defendants to obtain new bonds if, upon affidavit, it appears the current bail[2] is "insufficient in amount." Article 16.16 allows this procedure before indictment, and Article 23.11 allows it after indictment. TEX. CODE CRIM. PROC. arts. 16.16, 23.11.

In AP-77,097, *State v. Singleton*, the Court of Criminal Appeals recently used Article 16.16 to require a defendant to obtain a new bond

---

[1] Although the appellant did not mention this in his motion to publish, this Court should be aware the Harris County Criminal Lawyers Association has filed a judicial complaint against the trial judge, mostly about her refusal to treat this Court's unpublished opinion as binding precedent: https://hccla.org/judicial-misconduct-complaint/.

[2] Articles 16.16. and 23.11 ask whether "bail" is insufficient, but Article 17.09 asks whether "the bond" is insufficient. In this context, this is a distinction without a difference. "'Bail' is the security given by the accused that he will appear and answer before the proper court…" TEX. CODE CRIM. PROC. art. 17.01. Bail "includes a bail bond or a personal bond." *Ibid*. No other type of bail is listed in the Code of Criminal Procedure. If the defendant's bond is insufficient, that means his bail is insufficient; and his bail would be insufficient only if his bond were insufficient.

because it appeared his then-current bond was insufficient in amount.[3] There was no question Timothy Singleton had made his $500 bond when the Court of Criminal Appeals ordered him to obtain a new bond in the amount of $100,000.[4] This Court's definition of "amount" here contradicts the definition the Court of Criminal Appeals used in *Singleton*.

Whether bond is "insufficient in amount" is not, as this Court held, a question of arithmetic; the law does not assign judges questions like, "Is a $40,000 bail bond sufficient to cover a $40,000 bail?" Instead, it is a prudential question of whether the amount of the bond required in a case is sufficient to meet the purposes of bail. That is a question that, within broad constitutional parameters, is given to the sound discretion of judges. The Court of Criminal Appeals was correct in *Singleton* to treat it as such.

---

[3] There were no opinions or substantial orders in this case. *See* http://www.search.txcourts.gov/Case.aspx?cn=AP-77,097&coa=coscca. Just like this Court's opinion here, this is not binding precedent, but it is an example of how the Court of Criminal Appeals interpreted the plain meaning of the phrase "insufficient in amount."

[4] Before the Court of Criminal Appeals required Singleton to obtain a new bond, this Court rejected a nearly identical motion the State filed with this Court. *See* http://www.search.txcourts.gov/Case.aspx?cn=01-20-00319-CR&coa=coa01.

Singleton is of course not binding because it is an unpublished order. But it would be peculiar if this Court created binding precedent that contradicted a recent decision by a superior court. This Court ought not do so.

Conclusion

Because this Court reached its decision in a manner that did not allow the normal vetting of the adversarial process, and because this Court's holding is incorrect and conflicts with a recent decision of the Court of Criminal Appeals, this Court should deny the appellant's motion to publish.

Kim Ogg
District Attorney
Harris County, Texas

/s/ C.A. Morgan
Clint Morgan
Assistant District Attorney
Harris County, Texas
500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

Certificate of Compliance and Service

I certify that, according to Microsoft Word, the portion of this response for which Rule of Appellate Procedure 9.4(i)(1) requires a word count contains 1,697 words.

I also certify that I have requested that efile.txcourts.gov electronically serve a copy of this brief to:

Brent Mayr
bmayr@mayr-law.com

Sierra Tabone
stabone@mayr-law.com

Stanley G. Schneider
stans12@aol.com

/s/ C.A. Morgan
Clint Morgan
Assistant District Attorney
Harris County, Texas
500 Jefferson Street, Suite 600
Houston, Texas 77002
Telephone: 713 274 5826
Texas Bar No. 24071454

Date: August 31, 2020

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Clinton Morgan
Bar No. 24071454
morgan_clinton@dao.hctx.net
Envelope ID: 45817145
Status as of 8/31/2020 8:37 AM CST

Associated Case Party: Joseph Gomez

Name	BarNumber	Email	TimestampSubmitted	Status
Stanley G. Schneider	17790500	stans3112@aol.com	8/31/2020 8:32:06 AM	SENT
Sierra Tabone	24095963	stabone@mayr-law.com	8/31/2020 8:32:06 AM	SENT
Brent Mayr		bmayr@mayr-law.com	8/31/2020 8:32:06 AM	SENT